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In The

Supreme Court of the United States

October Term, 1950

No. 358

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE OF UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

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In The

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No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE OF UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Brief Amicus Curiae of State of Wisconsin

NATURE OF INTEREST OF AMICUS

We have read and concur in the able briefs submitted by petitioners herein and by the National Association of Attorneys General. The state of Wisconsin is concerned that in this action there shall not be established a precedent that will deprive its citizens of the free and untrammeled services of its legislators who conceivably may be placed in fear by the threats of vexatious litigation brought by

persons who are seeking to subvert the orderly processes of government.

We regard the principal issue herein as the issue of the proper construction of the Tenth and Fourteenth Amendments to the Constitution of the United States in light of Article IV, Section 4 of that Constitution. It is our argument that a proper construction and harmonizing of those provisions of the Constitution will show that the people in adopting the Fourteenth Amendment never intended to authorize the federal government to interfere with the internal government of states or of their officers when acting under due form of law. It is our further argument that Congress in passing the civil rights act of 1871 in turn never intended to create a cause of action against state officers and in particular state legislators who are acting in due form of law. Further, we propose to argue in any event that Brandhove because of his status as shown in his petition is not entitled to assert those privileges and immunities which are dependent upon citizenship in the United States or in the State of California.

SCOPE OF THIS BRIEF

We propose to supplement the brief of petitioners by stating herein for the convenience of the court the rules of construction which we believe applicable to the federal constitution and statutes and the authorities which establish and support those rules.

I. It Is an Established Rule for the Construction of the Constitution that Provisions Which May Appear to be Repugnant Shall be Harmonized and Reconciled and Effect Given to Both Insofar as Possible.

The Tenth Amendment preserves to the states all powers which are not expressly granted to the United States or prohibited to the states. Article IV, Section 4 of the United States Constitution, which is in effect a directive to Congress and not a provision to be enforced by the courts, insures to each of the states a republican form of government. The Fourteenth Amendment states that no state shall deprive any person of life, liberty or property without due process of law. When this amendment was passed the Tenth Amendment remained a portion of the Constitution and was in no way expressly repealed. If a construction of the Fourteenth Amendment were possible within the language of that Amendment which would render the Tenth Amendment wholly nugatory, it would appear that our controlling rules of interpretation militate strongly against such a construction.

We respectfully suggest that such a construction of the Fourteenth Amendment is not only possible but is the construction which is contended for by Brandhove in the instant action. The Fourteenth Amendment may be implemented in two ways:

1. The Congress may provide that the courts of the United States and the Supreme Court shall have review jurisdiction to reverse any decrees of any state court or agency which would purport to deprive any person of life, liberty or property in contravention of the Fourteenth Amendment.

2. The Congress might provide that not only should the action of the state agency be reversed by a federal court but that every person who participated in the action of the state agency should be liable to the sanctions of criminal punishment and civil damages in a proceeding brought before a federal court.

We respectfully suggest that this second alternative carried to its logical extreme would result in the complete negation of the Tenth Amendment and the guaranty of a republican form of government and of the destruction of all independent actions by the state. Such a construction would mean that every judge who erred in the interpretation of a provision of the federal constitution would possibly be liable to federal sanctions; every jury that participated in an erroneous verdict, every peace officer who executed an erroneous warrant or writ, every legislator who voted for an enactment later held invalid, and, as in the present case, every member of a legislative committee when engaged in an investigation later held to be improper, would be liable also to federal sanctions.

We concede that an amendment to the federal constitution could be framed and adopted which would have that effect and which would result in a repeal of the Tenth Amendment. But we respectfully suggest that under a proper interpretation of the Fourteenth Amendment such result was not intended.

The rule of construction applicable to such a case was laid down at an early date by Chief Justice Marshall in the case of *Cohens v. Virginia*, 19 U. S. 264, 6 Wheat. 264, 5 L. ed. 257, in which he stated in discussing the jurisdiction of the United States Supreme Court:

"* * * These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party, may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution as to give effect to both provisions *as far as it is possible to reconcile them*, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument." (Italics supplied.)

We respectfully suggest that the paralysis of all functions of state government which might result from the more liberal interpretation of the Fourteenth Amendment was never contemplated or intended by the people when that Amendment was adopted, and the fact that the Tenth Amendment was not expressly repealed must be given due weight and consideration in the determination of the extent of the powers conferred by the Fourteenth Amendment. Both provisions remain a part of our constitution and both must be construed so that one does not unnecessarily override the other.

The right to prescribe their own internal organization and government is an important right of the states. *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. ed. 1187.

The foregoing argument is reinforced by the similar proposition that the Constitution must be construed as a whole. In the recent case of *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 67 Sup. Ct. 156, 91 L. ed. 80, this court quoted with approval the statement

of Chief Justice Taney in *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 571, 10 L. ed. 579:

> "In expounding the constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident, from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning * * *."

II. It Is Not Lightly to Be Assumed that in Adopting Any Constitutional Amendment there Was a Purpose to Depart from or Imperil a Constitutional Principle so Vital to the System of Government as the Independence of the Three Coordinate Branches thereof and in Particular of the Legislative Branch from the Judicial Branch.

Complementing the argument under paragraph I, we further respectfully suggest that an intention by a Constitutional Amendment to overturn a large and vital body of law which has been established by this court through its decided cases should not be assumed. While the end result in the case of *Evans v. Gore*, 253 U. S. 245, 64 L. ed. 887, 40 S. Ct. 550, has since been reversed the principle is well stated in that case: "That a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed."

We suggest that the same principle applies to the construction of any constitutional amendment which would unduly infringe upon the independence of the legislature, both of the states and the federal government. It must unquestionably be conceded that such independence could be destroyed, but we insist that such destruction should be accomplished by express language and not by construction of such general language as is found in the Fourteenth Amendment.

Similar considerations apply to the Acts of Congress, with the further proviso that Congress is charged with enforcing Art. IV, Sec. 4, and the presumption of official regularity requires the court to assume that Congress has done its duty, and to adopt that possible construction of Congressional Acts which is consistent with the obligation.

III. The Independence of the Legislative Branch is Established and Reinforced by Two Well Settled Rules of Law Which Have Continuously Been Applied and Recognized by this Court Both before and after the Adoption of the Fourteenth Amendment.

a. There is a field of political action in which the legislature is recognized as supreme. This field includes the right of the legislature to arrange its own internal affairs and its own rules of procedure

The rule is stated in 16 C. J. S. 431, para. 145: "Political questions do not constitute matter for determination of the judiciary."

The following are representative cases in which the rule was applied:

Indian Affairs and Treaties

The Cherokee Tobacco, 78 U. S. 616, 20 L. ed. 227;

United States v. Sandoval, 231 U. S. 28, 58 L. ed 107, 34 S. Ct. 1;

Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 S. Ct. 794.

Recognition and Status of Foreign Governments

Jones v. U. S., 137 U. S. 202, 34 L. ed 691, 11 S. Ct. 80;

Smith v. U. S., 137 U. S. 224, 34 L. ed 700, 11 S. Ct. 88;

Recaud v. American Metal Company, 246 U. S. 304, 62 L. ed 733, 38 S. Ct. 312;

U. S. v. Pink, 315 U. S. 203, 86 L. ed 796, 62 S. Ct. 552.

Definition of Legal Tender

The Legal Tender Cases, 110 U. S. 421, 28 L. ed 204, 4 S. Ct. 122.

Acquisition of Territory

U. S. v. Regner, 50 U. S. 127, 13 L. ed 74;

Dred Scott v. Sandford, 60 U. S. 393, 15 L. ed 691.

Powers Over Public Lands

U. S. v. City and County of San Francisco, 310 U. S. 16, 84 L. ed 1050, 60 S. Ct. 749.

Adoption of Amendments to the United States Constitution

Coleman v. Miller, 307 U. S. 433, 83 L. ed 1385, 59 S. Ct. 972;

Luther v. Borden, 48 U. S. 1, 12 L. ed 581.

Status of War or Peace

United States v. Lee, 106 U. S. 196, 27 L. ed 171, 1 S. Ct. 240.

Status of Vessel as Prize of a War

The Florida, 101 U. S. 37, 25 L. ed 898.

Recognition of State Government

State of Texas v. White, 74 U. S. 700, 19 L. ed 227.

Boundaries of Nation

Foster v. Neilson, 27 U. S. 253, 7 L. ed 415.

Jurisdiction of Land Claims of Foreign Origin

Tameling v. U. S. Freehold and Immigration Company, 93 U. S. 644, 23 L. ed 998.

Venue of Actions in District Court

U. S. v. Union Pacific Railroad Company, 98 U. S. 569, 25 L. ed 143.

Definition of Obstructions to Navigation

United States v. Appalachian Electric Power Company, 311 U. S. 377, 61 S. Ct. 291, 85 L. ed 243.

We similarly suggest that the necessity or desirability of establishing a legislative investigating committee and prescribing its subject of inquiry and its mode of operation is again purely a political question subject only to those traditional safeguards which have uniformly been accorded to persons summoned before such committees, that is, the rights to object to improper questioning and to have any issue of contempt determined in a judicial proceeding.

b. The motives of the legislature and its members in taking any action in forma legis within the scope of its powers may not be inquired into

Supplementing the citations in petitioner's brief in support of the above proposition we respectfully offer the following:

In *Fletcher v. Peck*, 6 Cranch. 129 it was stated that the respect which the court entertains for the legislative department of the government as well as grave reasons of public policy might forbid any inquiry into the motives of the legislative body with a view of defeating the operation of any public legislative enactment. In *Ex parte McCardle*, 7 Wall. 513, 74 U. S. 506, 19 L. ed 264, the court stated:

> "We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the constitution."

In *Doyle v. Continental Insurance Company*, 94 U. S. 541 the court stated:

> "If the act done by the state is legal, is not in violation of the constitution, . . . it is quite out of the power

of any court to inquire what was the intention of those who enacted the law."

This principle is also followed in the following cases:

State of Arizona v. State of California, 283 U. S. 423, 51 S. Ct. 522, 75 L. ed 1154;

Smith v. Kansas City Title and Trust Co., 255 U. S. 180, 41 S. Ct. 243, 65 L. ed 577;

A. Magnano Company v. Hamilton, 292 U. S. 40, 78 L. ed 1109, 54 S. Ct. 599;

Henneford v. Silas Mason Co., 300 U. S. 577, 81 L. ed 814, 57 S. Ct. 524;

Fox v. Standard Oil Company of N. J., 294 U. S. 87, 55 S. Ct. 333, 79 L. ed 780;

State of Oklahoma ex rel. Phillips v. Guy S. Atkinson Co., 313 U. S. 508, 61 S. Ct. 1050, 85 L. ed 1487.

In view of the uniformity of application of the rule from the time of *Fletcher v. Peck* down to the most recent pronouncements of this court, we respectfully suggest that the rule of *stare decisis* is applicable and that in view of the need for a reasonable degree of certainty in the law this proposition cannot now be inquired into.

We recognize that the proposition may have effect only when the legislative body is acting under due forms of law, that is, in *forma legis*. That is, if by some almost inconceivable chance a legislative committee should become so benighted as to use its subpoena and inquisitorial powers as a prelude to unlawful sanctions of the type employed in the case of *Screws v. United States*, 325 U. S. 91, 89 L. ed 1495, 65 S. Ct. 1031, then under the rule in that case its

motive, that is, its wilful intent, would immediately become material. But when the legislative committee is acting under due forms of law, the persons affected by its actions are in fact receiving due process of law and hence have no grounds for complaint. While the term "due process of law" is not susceptible of exact definition, there is respectable authority that it is the equivalent of the term "law of the land (per legem terrae)" as set forth in Magna Charta. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed 616; Brannon, The Fourteenth Amendment, p. 138. In fact Lord Coke defined "law of the land" as "the old law of the land; that is, by the *due course and process of law.*"

We respectfully suggest that actions and procedures which follow the traditional and customary forms of law and of legal action are in fact due process. In the case of *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. ed 569, 4 S. Ct. 663, it is stated:

> "It is sufficient to say that by due process of law is meant one which following *the forms of law* is appropriate to the case and just to the parties to be affected. It must be pursued *in the ordinary mode* prescribed by law."

And again it has been stated:

> "Due process means in the due course of legal proceedings *according to the rules and forms* established for the protection of private rights." *Westervelt v. Gregg*, 12 N. Y. 209.

In the case of *Fletcher v. Peck, supra*, the court founded its decision that the motives of the legislature could not be inquired into on one consideration that, "the act be clothed with all the requisite forms of a law." The requisite of

passage in proper form as a condition of validity was also recognized in *Calder v. People of Michigan*, 218 U. S. 591, 31 S. Ct. 122, 54 L. ed 1163.

In *Tumey v. State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed 749, the court stated that settled usages and modes of procedure previously existing under the common law are determinative of due process. This rule was also recognized in the following cases:

Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed 158;

Patterson v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed 158;

Weems v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed 158.

In Spanish law the phrase "en debida forma" which is translated "in due and proper form" in legal meaning is translated as "in due process of law." Escriche Diccionario. 26 C. J. 983.

Accordingly in the present case when the complaint shows on its face that the legislative investigating committee proceeded in accordance with the traditional forms and customs of such committees it would appear that any witness who appeared before it has in fact been accorded due process of law, and any inconvenience he may have suffered is *damnum absque injuria*.

The record shows that the committee was established in form by act of the legislature, that it was duly convened and organized for the purpose of pursuing its inquiries, that Brandhove was summoned as a witness by service of a subpoena, that he appeared before the committee in formal session accompanied by his counsel, that he was questioned

in the presence of the committee and counsel and declined to answer, that no sanctions were applied to him in the presence of the committee, that thereafter the legality of his failure to answer the questions was submitted to a court formally and regularly convened and, finally, that a jury refused to convict Brandhove of wrongful conduct in refusing to answer the questions. We suggest that the foregoing procedure satisfies all requirements of the traditional forms and practices of legislative investigating committees. If Brandhove was thereby inconvenienced, his inconvenience was no greater than that of a witness at a trial, or of a juror at a trial, or one who is called upon to aid a peace officer in the performance of his duty, or one who is ordered into the service of the Armed Forces of his country. In all such cases, there is an interference with liberty which does not in every case result from a judicial process, yet in every case it would be recognized that such interference is a result of due process of law. If Brandhove was put in fear by this course of conduct, the outcome of the proceedings shows his fears were unjustifiable. At no time does he even allege that there was any threat to apply to him the sanction of unlawful force or any other sanction that might give rise to a legal injury.

It is submitted that the record shows the legislative committee acted in due form of law and hence its motives cannot be inquired into.

IV. By His Oath of Allegiance to the Communist State, Brandhove Expatriated Himself and Is No Longer Entitled to Assert the Privileges and Immunities of Citizenship in the United States of America or the State of California.

The principle above stated was not raised in the lower court. While it is generally true that questions not raised in the lower courts will not be considered on appeal, there is a well recognized exception in the cases of questions of public policy or of great public interest. 3 C. J. 742. We suggest that the question herein raised is of crucial importance and that the court does have power to consider it if it so chooses.

We respectfully suggest that the time has come to apply to bodies politic and corporate in the political field that same salutary principle of law which has long been applied to bodies corporate in the economic field. The essence of the rule is that the fiction of corporate personality may not be asserted for the purpose of evading a statute or perpetrating a fraud. That is, if a certain course of conduct is forbidden to a man or a group of men by a controlling statute, they cannot engage in and gain the benefits of that course of conduct by the device of forming a corporation and asserting the existence of a separate corporate entity. Similarly, if the course of conduct is forbidden to a class of corporations, as railroad corporations are forbidden to grant rebates to shipping corporations, the shippers cannot form a second corporation for the purpose of receiving the rebate and assert its acts are not its own. In a host of such cases our courts throughout the land have uniformly held that the separate corporate entity will be disregarded and the court will look at and pass upon the facts as they

are. A minimum citation of representative authorities and cases will serve to remind the court of the soundness of this proposition. They are as follows:

Wormser, *Disregard of the Corporate Fiction*, Baker, Voorhees and Company, 1929;

Efficacy of the Corporate Entity in Evasion of Statutes, 26 Ia. L. Rev. 350 (1940-41);

Fletcher, *Cyclopedia of Corporations*, Vol. 1, p. 170 (Perm. Ed.);

Ballentine, *Separate Entity of Parent and Subsidiary Corporations*, 60 Am. L. Rev. 19 (1926);

Canfield, 17 Col. L. Rev. 128 (1917).

Wormser states:

"When the conception of a corporate entity is employed to defraud creditors, to evade an existing obligation, *to circumvent a statute* to achieve or perpetuate monopoly, *or to protect knavery or crime*, the court will draw aside the web of entity, will regard the corporate company as an association of live, up and doing, men and women shareholders, and will do justice between real persons." Page 84.

United States v. Milwaukee Refrigerator Transit Company, (Ed. Wis. 1905) 142 Fed. 247;

United States v. Lehigh Valley R. R. Co., (1911) 220 U. S. 257, 31 S. Ct. 387, 55 L. ed 458;

Anderson v. Abbott, (1944) 321 U. S. 349, 362, 64 S. Ct. 531;

People v. Michigan Bell Telephone Co., 224 N. W. 438 (Mich. 1929).

We suggest that an application of similar principles to the so-called Communist party will show that it is not a political party in the commonly accepted sense of the word at all, but that it is in fact the Communist State with its headquarters in Moscow, Russia, and operating under the name and style of the Soviet Union.

We suggest that at the present time this status has become a matter of common knowledge of which this court may take judicial notice. Whatever honest doubts may have existed in the trying and troublesome times of 1942 and 1943 when the case of *Schneiderman v. United States of America*, 320 U. S. 118, 87 L. ed 1796, was decided, surely the events of the past five years have washed away every last vestige of ground on which they might rest. In nation after nation we have watched the so-called local Communist party rise as a vanguard of Communist arms bent on conquest and have witnessed the leaders of the party thereafter render slavish devotion and obedience to their masters in Moscow. We have observed the citizens of the Communist State in America, who go by the name of the members of the Communist party, follow with unswerving fidelity every twist and turn in the policy laid down by their acknowledged supreme ruler. We have heard those persons who sought to break away from the rule of Moscow denounced as traitors. Can it be believed that a person who has pledged his allegiance to such an organization has not thereby pledged his allegiance to that particular government which goes by the name of the Union of Socialist Soviet Republics, and if he has so pledged his allegiance, has he not as effectively expatriated himself as though he had transferred his allegiance to the Crown of Britain or the Republic of France?

In the *Schneiderman case* it was recognized that party members pledged their adherence to Communist party principles and tactics. One recently circulated version of the oath now taken by Communist party members in America concludes with the sentence:

> "I pledge myself to rally the masses to defend the Soviet Union, the land of victorious socialism, I pledge myself to remain at all times a vigilant and firm defender of the Leninist line of the Party, the only line that insures the triumph of Soviet Power in the United States."

We submit that any pledge of adherence to Communist party principles, in whatever double talk it may be concealed, is in fact a pledge of allegiance to a foreign state and that any person who makes that pledge is thereby expatriated.

The foregoing considerations are material in the present case for the reason that the petition before the district court filed by Brandhove contains a reference to a document which describes him as a former admitted member of the Communist Party, and nowhere in Brandhove's own petition is that statement denied. Hence it must be taken as a verity.

The reference to *former* membership is immaterial. Citizenship in the United States of America is not a privilege that may be taken off lightly and resumed at will. An expatriate is an alien just as much as a person who is born in a foreign land and the privileges of citizenship can only be restored by naturalization.

If it is recognized that Brandhove has expatriated himself then clearly he is not entitled to assert the right of peti-

tion to the legislature since that is a right of citizenship as is fully established by petitioners' brief in this court.

CONCLUSION

We respectfully submit that the judgment of the circuit court of appeals should be reversed with directions to dismiss the complaint. Over and above the right of any individual to enjoy the right of free speech is the right of all the peoples to confer upon their legislators an unlimited and untrammeled right of free speech, free discussion and free examination of issues. This right of all the people would be severely abridged if a rule should be established whereby those legislators would henceforth be subject to the sanctions of vexatious legislation even for acts undertaken under traditional and customary forms of procedure.

Respectfully submitted,

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